

# ENTWISTLE & CAPPUCCI

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January 8, 2016

## VIA ECF FILING

Honorable Charles R. Breyer  
United States District Court  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

Re: *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC)

Dear Judge Breyer:

We respectfully provide this letter response and proposal pursuant to the Court's Pretrial Order No. 2 (Dkt. No. 336), both in support of the creation of a Plaintiffs' Steering Committee and in support of our appointment as the Steering Committee Member Firm for New York.

### **I. Proposal for the Creation of a Plaintiffs' Steering Committee**

We respectfully submit that the best way to assure an expeditious and efficient recovery for the hundreds of thousands of U.S. consumers who purchased or leased the so-called "clean diesel" vehicles from Volkswagen ("VW"), Audi and Porsche is to create a Plaintiffs' Steering Committee comprised of firms representing the U.S. jurisdictions where the most "clean diesel" vehicles are registered. To assure the Steering Committee speaks with one voice where the Court is concerned, we propose that the Steering Committee also have a separate Chair that would lead the Committee and act as Liaison Counsel with the Court. In our experience, a prerequisite for the Liaison Counsel/Chair is that they are located within the District, familiar to and with the Court and that they are experienced in complex litigation. While we do not presume to suggest to the Court its selection for this role, we note that we have worked with Elizabeth Cabraser of the Lieff Cabraser firm and have always found her to be highly skilled, professional, pragmatic and creative.

With respect to the composition of the Plaintiffs' Steering Committee itself, we have worked with auto industry market research firm Hedges & Co. to confirm, as reflected in Exhibit 1 hereto, the number of registered "clean diesel" VW, Porsche and Audi vehicles in each state through the second quarter of 2015. While the Court could set the "cutoff" for the inclusion of a state at any number of affected registered vehicles, we note that if Your Honor uses 10,000 registered vehicles as the cutoff, the Plaintiffs' Steering Committee would have 20 members including the Liaison Counsel/Chair (*i.e.*, Steering Committee members representing the states of: (1) California, (2) Texas, (3) Florida, (4) New York, (5) Illinois, (6) Pennsylvania, (7) Washington, (8) Virginia, (9) North Carolina, (10) Massachusetts, (11) New Jersey, (12) Maryland, (13) Colorado, (14) Oregon, (15) Ohio, (16) Georgia,

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(17) Wisconsin, (18) Michigan, and (19) Connecticut). *See* Exhibit 1.<sup>1</sup> Appointing counsel from each of these states will ensure efficient representation of a majority of U.S. consumers damaged by Defendants' conduct and assure that the Steering Committee will have the benefit of expertise in the state law of the most adversely impacted jurisdictions.<sup>2</sup> The Court may also wish to appoint a few "at large" members to assure the best overall composition or inclusion where there is more than one top firm for a jurisdiction or no representation for some major jurisdictions.

## **II. Appointment of Entwistle & Cappucci LLP and Andrew Entwistle as a Member of the Plaintiffs' Steering Committee for New York**

We respectfully request that Andrew Entwistle of our firm be appointed as a member of the Plaintiffs' Steering Committee to represent the interests of affected consumers in New York.

Judge Castel appointed our firm Interim Co-Liaison Counsel for Plaintiffs in the Volkswagen "clean diesel" cases filed in the United States District Court for the Southern District of New York (*In re Volkswagen "Clean Diesel" Liability Litigation*, 15-cv-7561 (S.D.N.Y.) (PKC)).<sup>3</sup> As Interim Co-Liaison Counsel we (i) successfully persuaded Judge Castel to enter a document preservation order (the first such order entered nationally), (ii) had a uniform date set for Defendants to respond to the pending complaints, and (iii) obtained formal coordination of all Southern District of New York actions. We respectfully submit that our appointment by Judge Castel, and our work in connection with that appointment to advance the VW litigation in New York demonstrates our ability to contribute to the leadership of this case.

Entwistle & Cappucci LLP is nationally recognized as a preeminent firm representing public and private institutions in complex multidistrict cases, including securities, antitrust, bankruptcy and consumer protection litigation. *See* Exhibit 2 (brief firm resume). Our firm has been appointed lead or liaison counsel, and served on steering committees in some of the largest class action cases ever filed including:

- *In re DaimlerChrysler Securities Litigation*, 00-cv-0993 (D. Del.) (co-lead counsel representing the State of Florida as lead plaintiff challenging the DaimlerChrysler merger; involved extensive pretrial litigation in the U.S. and Germany; obtained a \$300 million settlement for the class) (Honorable Joseph J. Farnan, Jr. (retired), Farnan LLP, 919 N. Market Street, 12<sup>th</sup> Floor, Wilmington, DE 19801; (302) 777-0321; farnan@farnanlaw.com);

<sup>1</sup> In addition to New York, I am admitted to the bar and regularly represent clients, including by appointment as a Special Attorney General, in Illinois, Texas, Colorado, Pennsylvania and New Jersey—all significantly impacted jurisdictions in the VW litigation.

<sup>2</sup> We have been contacted by various firms that filed cases around the country soliciting our support for leadership or membership on a steering committee. We have worked with all or most of these firms in the successful prosecution of MDL matters and other complex litigation in leadership positions. All are fine, experienced lawyers who would certainly contribute to the leadership of this case and we did not feel it appropriate to support one firm over another here.

<sup>3</sup> We represent Plaintiff Robert Fonte in the class action captioned *Fonte v. Volkswagen Group of America, Inc.*, 15-cv-6140 (N.D. Cal.) (transferred from the S.D.N.Y.) (Dkt. No. 188), as well as Plaintiff Anthony Conte in a VW class action transferred from the District of New Jersey. *See Conte v. Volkswagen Group of America, Inc.*, 15-cv-6258 (N.D. Cal.) (Dkt. No. 187). While the class actions we filed here both involve purchasers and lessors of "clean diesel" vehicles, we also note our past involvement in both the GM and Chrysler bankruptcies on behalf of dealers and auto industry lenders.

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- *In re Royal Ahold Securities Litigation*, 03-md-1539 (D. Md.) (lead counsel representing the State of Colorado as lead plaintiff for a global class of Ahold investors; successfully conducted proceedings in the U.S. and Netherlands to protect class interests; obtained a \$1.1 billion settlement for investor class) (Honorable Catherine C. Blake, 101 W. Lombard Street, Baltimore, MD 21201; (410) 962-3220);
- *In re MF Global Holdings Ltd. Litigation*, No. 11-cv-7866 (S.D.N.Y.) (co-lead counsel for a class of former MF Global commodities customers—including claims in Great Britain; achieved over \$1.6 billion partial settlement to date) (Honorable Victor Marrero, 500 Pearl Street, New York, N.Y. 10007; (212) 805-6374); and
- *In re Tribune Company Fraudulent Conveyance Litigation*, 12-mc-2296 (S.D.N.Y.) (co-liaison counsel for defendants in lawsuit seeking to “clawback” \$6 billion in shareholder payments from leveraged buyout transaction; obtained dismissal of state law claims as a defense team member) (Honorable Richard J. Sullivan, 40 Foley Square, New York, N.Y. 10007; (212) 805-0264). We note that in *Tribune* we were specifically asked by the Court to organize more than 2,400 defendants and their counsel into a structure that could then be adopted by the Court. Not only did the Court adopt that structure, it also employed it in structuring a related companion case.<sup>4</sup>

Our prior track record amply demonstrates our commitment to the creative, efficient and pragmatic litigation and resolution of complex cases—including cases that require extensive investigation and litigation overseas and/or protracted and complicated mediation efforts.<sup>5</sup> For example, we effectively litigated the *Ahold* action here and in the Netherlands, and the *DaimlerChrysler* litigation here and in Germany. Both cases involved voluminous document review, retention of multiple experts, translators and legal proceedings abroad. More recently, we have simultaneously and successfully litigated both the *MF Global* and *In re Tremont*, 08-cv-11117 (TPG) (S.D.N.Y.) class actions for more than four years—recovering more than \$1.6 billion for customers in the *MF Global* litigation and \$2.5 billion for customers in the *Tremont* litigation.

In sum, we are confident that the firm’s contribution during the preliminary stages of this litigation and our significant and successful record of class action work makes us ideally suited to serve on the Steering Committee. We are available to provide any additional information that the Court requires, and look forward to appearing before Your Honor at the conference scheduled for January 21, 2016.

Respectfully submitted,

ENTWISTLE & CAPPUCCI LLP

/s/ Andrew J. Entwistle

Andrew J. Entwistle

(admitted *pro hac vice*)

cc: All counsel of record via ECF

<sup>4</sup> Our leadership role in the above cases, and other cases we have been involved in, very much stressed transparency to the class, including organizing and maintaining case-specific websites, special telephone help lines, periodic case updates and the like.

<sup>5</sup> In the mediation and alternative dispute context, we have worked with many of the mediators proposed to Your Honor in this case and we invite you to solicit their views of our ability to contribute to the leadership and pragmatic resolution of this litigation.